No. 83-2144

In The

Supreme Court of the United States

October Term, 1983

—o—

SAMUEL P. GARRISON, ET AL.,

Petitioners,

v.

JAMES HUDSON,

Respondent.

—o—

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

—o—

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

§ 15A-1419. *When motion for appropriate relief denied.*

(a) The following are grounds for the denial of a motion for appropriate relief:

(1) Upon a previous motion made pursuant to this Article, the defendant was in a

position to adequately raise the ground or issue underlying the present motion but did not do so. This subdivision does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right. This subdivision does not apply when the previous motion was made within 10 days after entry of judgment.

(2) The ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.

(3) Upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so.

(b) Although the court may deny the motion under any of the circumstances specified in this section, in the interest of justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious.

———o———

ARGUMENT

James Hudson, for the first time, has made the claim in his Brief in Opposition that he has exhausted state remedies on his vouching issue by direct appeal. Although in that appeal, his lawyer raised five issues concerning

the jury argumment, his assertion that this exhausted state remedies is incorrect for the relevant arguments made in the Fourth Circuit were not made in the state Supreme Court. Copies of the North Carolina Supreme Court opinion, the record on appeal in state court and defendant's appeal brief are submitted in support of this position.

Defendant's first state court appellate argument on the District Attorney's summation was as follows:

> Was the argument of the District Attorney for the State so misleading and inflammatory and prejudicial against the defendant that the argument denied the defendant a fair and impartial trial and that therefore entitled him to a new trial?

His argument in this regard related to a reference by the District Attorney that the jury should not hold a prior conviction against his witness. This is not included in the excerpts cited or the arguments made to the Fourth Circuit as error and was not argued as error in the Fourth Circuit.

Defendant's next state court appellate argument on the District Attorney's summation was as follows:

> Were the remarks of the District Attorney for the State so inflammatory and prejudicial against the defense counsel that they denied the defendant a fair and impartial trial and that, therefore, entitled him to a new trial?

His argument in this regard asserted that his lawyer was held up to ridicule and the defendant's guilt was implied by the argument made by the prosecutor. No specifics were given although three cases were cited. Six page references were cited in the Assignments of Error—R p 52, 53, 54, 55, 56 and 59—however only R p 59 contained any

of the six references he now relies on (Petition for Certiorari pp 6-7):

> It ain't the most beautiful case I ever prosecuted, I'm not going to tell you any lie—it has some holes in it. A five year old Murder and Robbery is going to have some holes in it, but thank the good Lord we have gotten the people who did it. Now its up to you to say what justice is in this County on this evidence.

This indirect connection is one of two overlaps between petitioner's direct appeal and his Fourth Circuit appeal and the assignments of error did not reference this portion of R p 59 as the error complained of there.

Defendant's next state court appellate argument on the District Attorney's summation was as follows:

> Was the argument of the District Attorney which refers to the criminal record of the defense witness, Linder, prejudicial and inflammatory, thereby denying the defendant a fair and impartial trial, and therefore entitling him to a new trial?

His argument in this regard was that Linder's credibility was attacked in terms not supported by the evidence. This was not included by his Fourth Circuit excerpts or argument.

Defendant's next argument in state court on the District Attorney's summation was as follows:

> Was the argument of the District Attorney so inflammatory and prejudicial against the defendant that it denied the defendant a fair and impartial trial, and therefore entitled him to a new trial?

His argument in this regard was that the District Attorney referred to the defendant as "wicked" and "mean". This has nothing to do with vouching and nothing in this

regard was claimed. A reference to defendant being "mean" occurred in the paragraph in which "rape" had been mentioned and therefore was an excerpt presented to the Fourth Circuit. But this was done in the context of petitioner's main contention there—that the reference to the rape was constitutional error. This indirect connection is the other overlap between Defendant's arguments on direct appeal and on collateral appeal.

Defendant's last state court argument on the District Attorney's summation was as follows:

> Was the argument of the District Attorney which referred to a .38 pistol which was not introduced into evidence and not produced as a result of defendant's motion for discovery of physical evidence, prejudicial against the defendant, so that the defendant was denied a fair and impartial trial, and therefore entitled him to a new trial?

This is an assertion that the argument went beyond the evidence and is not something which was included in his Fourth Circuit excerpts and argument.

From the above, it can be seen that state remedies were not exhausted by Defendant with regard to the claim that he received relief on. Exhaustion requires the fair presentation of claims to the state courts but the use of different legal theories from those raised in state court do not constitute fair presentation under *Picard v. Connor*, 404 US 270 (1971) and *Anderson v. Harless*, 459 US 4 (1983). What Defendant hopes to gain by a claim of exhaustion is to avoid a presentation of these claims in state court which will almost certainly result in them being described as waived under NCGS § 15A-1419. An unfortunate decision in the Fourth Circuit, *Richardson v.*

Turner, 716 F.2d 1059 (4th Cir. 1982), precludes this decision by the federal judiciary in advance of an actual holding to this effect by a state court.

Submitted as the Reply Brief of Samuel P. Garrison, et al., this 2nd day of August, 1984.

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APPENDIX A:

EXCERPTS FROM DEFENDANT'S STATE CONRT APPEAL BRIEF

* * *

ARGUMENT NO. 6

Was the argument of the District Attorney for the State so misleading and inflammatory and prejudicial against the defendant that the argument denied the defendant a fair and impartial trial and that, therefore, entitled him to a new trial?

Exception No. 5 (R pp 70 and 38-63)
(Jury Argument) and (R p 49)

The defendant contends that the argument of the District Attorney for the State of North Carolina to the jury wherein the District Attorney stated that the witness, Garris, "has been into plenty. That doesn't make any difference whether or not you believe what he had to say about what happened June 29, 1972 down at Lineberger's Store in Mooresville." [*sic*] A witness' prior criminal convictions relate directly to his credibility for purposes of impeachment and the rule of law is contrary to the misleading statement which the District Attorney made during his argument. The argument of the District Attorney was improper, prejudicial, and inflammatory, and thereby influencing the jury by not only intimating but directly stating that Garris' past had nothing to do with his credibility. Any instructions given by the Court during the course of the trial and in the Judge's charge with regard to credibility were insufficient to contradict this misleading statement.

ARGUMENT NO. 7

Were the remarks of the District Attorney for the State so inflammatory and prejudicial against the defense counsel that they denied the defendant a fair and impartial trial and that, therefore, entitled him to a new trial?

Exception No. 6 (R pp 52, 53, 54, 55, 56 and 59)

The defendant contends that the remarks of the District Attorney for the State of North Carolina to the jury during his argument concerning the counsel for the defendant were inflammatory and prejudicial in that they held the defendant's counsel in light of ridicule to the jury and implied the defendant's guilt. In support of this assignment, the defendant calls attention to several North Carolina Supreme Court decisions involving prejudicial remarks of the District Attorney, said decisions being as follows: STATE v SMITH, 240 NC 631; STATE v TUCKER, 190 NC 708 and STATE v MILLER, 271 NC 646.

In STATE v SMITH the Court cited STAR v OIL COMPANY, 165 NC 587, in saying "Court should be very careful to safeguard the rights litigants and to be as nearly sure as possible that each party shall stand before the jury on equal terms with his adversary, and not be hampered in the prosecution of defense of his cause, by extraneous considerations, which militate against a fair hearing". The District Attorney's remarks during the argument were of such a nature that they held the defense attorney in ridicule and it is argued by the defendant that these remarks were extraneous considerations, which militated against a fair hearing for the defendant.

In STATE v TUCKER, the Court cited Bynum, J., in COBLE v COBLE, 79 NC 590, as follows: "some allow-

ance should be made for the zeal of counsel and the heat of debate, but here the language and meaning of counsel were to humiliate and degrade the defendant in the eyes of the jury and bystanders—a defendant who had not been impeached by witnesses, by his answer to the complaint or by his conduct of the defense, as it appears of record. Such an assault is no part of the privilege of counsel and was well calculated to influence the verdict of the jury. In the instant case the defendant contends that the State attacked the defendant's credibility indirectly by attacking the credibility of his attorney through remarks made by the District Attorney during the argument. In the case of STATE v TUCKER, the Supreme Court, awarded a new trial to the defendant, said "to uphold this ruling (the Judge's ruling that the remarks of the Solicitor could stand) would mean, not only to sanction the vituperative language used in the present case, but also to open the door for advocates generally to engage in vilification and abuse—a practice which may be all too frequent, but which the law rightfully holds in reproach. If verdicts cannot be carried without appealing to the prejudice or resorting to unwarranted denunciation, they ought not to be carried at all. We think the course pursued in the instant case was detrimental to the defandant." In the instant case the defendant contends that the District Attorney has gone beyond the bounds of propriety in his comments made during the argument and that his remarks were so prejudicial and inflammatory as to warrant a new trial.

ARGUMENT NO. 8

Was the argument of the District Attorney which refers to the criminal record of the defense witness, Linder,

prejudicial and inflammatory, thereby denying the defendant a fair and impartial trial, and therefore entitling him to a new trial?

Exception No. 7 (R p 58)

The defendant contends that the argument of the District Attorney for the State of North Carolina to the jury was inflammatory and prejudicial wherein the District Attorney stated that the key defense witness, Linder, was "serving big time from Union County, kidnapping, felonious assault, every other kind of felony you could think of." While the Solicitor may comment on the credibility of the witnesses, the Solicitor may not distort the facts to the extent that it will prejudice the jury. In the instant case, the defendant contends that the District Attorney has gone beyond the bounds of propriety in his comments made during the jury argument, and that there is nothing in the evidence to warrant the remarks made by the District Attorney or to indicate that there is any factual basis for his remarks. The remarks of the District Attorney were inflammatory and prejudicial and highly improper thereby denying the defendant a fair and impartial trial.

ARGUMENT NO. 9

Was the argument of the District Attorney so inflammatory and prejudicial against the defendant that it denied the defendant a fair and impartial trial, and therefore entitled him to a new trial?

Exception No. 8 (R pp 72 and 38-63) (Jury Argument)

The defendant contends that the remarks of the District Attorney for the State of North Carolina during the Jury Argument were inflammatory and prejudicial in that

they held the defendant in a light of ridicule and subjected the defendant to unwarranted abuse wherein the District Attorney called the defendant "wicked" and later in this argument called the defendant "mean". These remarks were calculated by the District Attorney to prejudice the defendant in the eyes of the Jury and were grossly improper. Coupled with the other comments made my the District Attorney with regard to the defendant, the defendant's witness, Linder, and the defendant's counsel, the defendant contends that the District Attorney went beyond the bounds of propriety in his argument and that while taking individually the remarks of the District Attorney during his argument may not be grossly improper so as to warrant a new trial, collectively the remarks of the District Attorney were grossly prejudicial against the defendant and deprived the defendant of a fair and impartial trial.

ARGUMENT NO. 10

Was the argument of the District Attorney which referred to a .38 pistol which was not introduced into evidence and not produced as a result of defendant's motion for discovery of physical evidence, prejudicial against the defendant, so that the defendant was denied a fair and impartial trial, an therefore entitled him to a new trial?

Exception No. 9 (R pp 54 thru 55)

The defendant contends that the argument of the District Attorney for the State of North Carolina was in error wherein the District Attorney repeatedly referred to a .38 pistol which was not introduced into evidence and which was not produced as a result of the defendant's motion for discovery of physical evidence. For real evidence to be exhibited it must be properly identified, see KALE v

DAUGHERTY, 8 NC App 417, 174 SE 2d 846 (1970), and the real evidence must be offered into evidence, and it is improper for counsel in argument to offer to show it to the jury when it has not been put into evidence, see STATE v EAGLE, 233 NC 218, 63 SE 2d 170 (1951). The case at bar differs from the case of STATE v CARTER, 17 NC App 234, 193 SE 2d 281 (1972), *cert. denied*, 283 NC 107 (wherein the North Carolina Court of Appeals ruled in a breaking and entering, and larceny in receiving case, that it was not prejudicial error to allow a Solicitor, in argument, to refer to a box of cigars and cigarettes identified by State's witness, marked as exhibit, and on display before the Jury, even if never formally introduced). In the case at bar the pistol was not produced by the District Attorney pursuant to the request for discovery filed June 7, 1977 nor was it produced pursuant to the motion for discovery filed August 3, 1977. The pistol would have been excluded from evidence for several different reasons, and as the District Attorney mentioned in his argument "the State didn't offer this gun into evidence because the gun was obtained from a woman who was not in court; we couldn't offer it into evidence, but Mr. Benbow didn't catch that either." The very nature of the real evidence, a pistol, which was allegedly taken during a vicious murder had a tremendous effect on the jury and could have well been the turning point in the jury's reaching its decision. Then to have the District Attorney argue that the defense counsel had helped to prove that the pistol was obtained from a woman who was not in court was extremely inflammatory and prejudicial and completely outside of the rules of evidence. In the case at bar the pistol had much more of an effect on the jury than did the box of cigars in the

STATE v CARTER case. In addition, in the STATE v CARTER case, the box of cigars could have been introduced into evidence, however, it appeared that the State inadvertently forgot to do so. In the case at bar, the pistol could not have been introduced into evidence, if the State had attempted to do so. However, the State did not attempt to introduce the pistol into evidence; the State was merely content to wave the pistol in front of the jury both during the presentation of evidence and during the argument and to have the pistol sit on the jury rail in full view of the jury during the trial.

APPENDIX B:

EXCERPTS FROM DEFENDANT'S STATE COURT ASSIGNMENTS OF ERROR

* * *

EXCEPTION NO. 4

IV. After the close of the evidence and after the argument of the defense counsel, the district attorney argued to the jury. The following argument was made by the district attorney:

> "As Mr. Benbow says, if you are going to try the devil, you have to go to hell to get your witnesses. I'm not telling you Garris is any Sunday School teacher—he has been into plenty. He has been into plenty. That doesn't make any difference whether or not you believe what he had to say about what happened June 29, 1972, down at Lineberger's Store in Mooresville."

EXCEPTION NO. 5

V. The district attorney further argued: "Mr. Benbow got up here and unbelievably at that point agreed this entire statement could go into evidence that Garris gave." The district attorney continued his argument and later stated, "He could also hear, like, a man talking in there, but here is what he said in the statement—Mr. Benbow didn't keep it out, he could have objected, but didn't." The district attorney further argued, "The State didn't offer this gun into evience because the gun was obtained from a woman who was not in court; we couldn't offer it into evidence, but Mr. Benbow didn't catch that either." The district attorney further argued, "If I had to prove that about his wife, I didn't have her here either, but Mr. Benbow

helped me prove it." The district attorney further argued, "The State of North Carolina is trying James Hudson, that man seated there in that shirt and tie—I bet his attorney bought it for him—we are trying him for that murder as being part of it." The district attorney further argued: "That's what we were trying, it's not as Mr. Benbow told you a minute ago that when the judge tells you the law also you listen, and then the relation that inference was made, listen to what Mr. Benbow wanted you to and nothing else;" The district attorney further argued: "That's the same thing every defendant's attorney does in the trial of any case is to try to put up a smoke screen and to discredit the testimony of the State's witness."

EXCEPTION NO. 6

VI. The district attorney argued as follows: "What do witnesses tell you—What did Linder tell you—Linder got on the stand just like Hudson, smiling and sure of himself, told you 'yes, sir,' he is serving big time in Union County, for kidnapping, felonious assault, and every other kind of felony you can think of, has the nerve to sit there and tell you he was coming up here and admit this if he did it when he pled not guilty in Union County."

EXCEPTION NO. 7

VII. The district attorney further argued: "I stand here and argue to you and Mr. Benbow stands here for that man who is young; I say to you who is wicked, and who participated in the armed robbery and killing of a middle aged man." And the district attorney further argued: "James Hudson, the defendant seated over there with a shirt and tie on, look at him—he is m an—he is mean

because of June 29, 1972—he participated in a killing and has the audacity, even though he has the right, to come in and say, 'No, I didn't—prove it on me.'"

EXCEPTION NO. 8

VIII. The district attorney further argued: "You heard Garris say he got his pistol from Mackey as part of the proceeds, this very pistol. Now Mr. Benbow said, 'We don't know whose pistol'—let me tell you, law is common sense." The district attorney further argued: "Now if Mackey went into the station carrying a shotgun, that was all he had, and came out carrying a gun, I want to ask you whose gun this is." "The State didn't offer this gun into evidence because the gun was obtained from a woman who was not in court; we couldn't offer it into evidence, but Mr. Benbow didn't catch that either."

"Now, the State said that this is Lathan Lineberger's gun. It was taken by Mackey, brought out of the store, Mackey gave it to Garris, Garris sold it to Lewis, Lewis, in jail, gave it to his wife, Cook got it from his wife. If I had to prove that about his wife, I didn't have her either, but Mr. Benbow helped me prove it."

EXCEPTION NO. 9

APPENDIX C

EXCERPTS FROM NORTH CAROLINA SUPREME COURT OPINION, *STATE v. HUDSON*, 295 NC AT 435

* * *

[7] By his remaining five assignments of error, defendant contends that the district attorney's closing argument was so improper, inflammatory and prejudicial that it denied defendant a fair and impartial trial. Examples of some of the portions of the district attorney's argument to which defendant excepted are as follows:

> As [defense counsel] says, if you are going to try the devil, you have got to go to hell to get your witnesses. I'm not going to tell you Garris is any Sunday School teacher—he has been into plenty. That doesn't make any difference whether or not you believe what he has had to say about what happened June 29, 1972, down at Lineberger's Store in Mooresville.
>
> * * *
>
> I stand here and argue to you and [defense counsel] stands here for that man who is young; I say to you who is wicked, and who participated in the armed robbery and killing of a middle aged man. . . . James Hudson, the defendant seated over there with a shirt and tie on, look at him—he is mean—he is mean because of June 29, 1972—he participated in a killing and has the audacity, even though he has the right, to come in and say "No I didn't—prove it on me." . . .
>
> * * *
>
> You heard Garris say he got his pistol from Mackie as part of the proceeds, this very pistol. Now [defense counsel] said, "We don't know whose pistol" —let me tell you, law is common sense. . . . Now, if

> Mackie went into the station carrying a shotgun, that was all he had, and came out carrying a gun, I want to ask you whose gun this is. The State didn't offer this gun into evidence because the gun was obtained from a woman who was not in court; we couldn't offer it into evidence, but [defense counsel] didn't catch that either. . . . Now, the State said that this is Lathan Lineberger's gun. It was taken by Mackie, brought out of the store, Mackie gave it to Garris, Garris sold it to Lewis, Lewis, in jail, gave it to his wife, Cook got it from his wife. If I had to prove that about his wife, I didn't have her either, but [defense counsel] helped me prove it.

Defendant made no objections to the argument of the district attorney prior to the coming in of the verdicts.

Ordinarily, objections to argument of opposing counsel must be made at trial in order to give the trial judge an opportunity to stop the improper argument and to instruct the jury to disregard the prejudicial material. Nevertheless, we recognize that in capital cases, we may review the prosecution's argument even when timely objection to the argument is not made at trial. Even so, the impropriety of the argument must be flagrant in order for us to hold that a trial judge abused his discretion by not correcting, *ex mero motu*, an argument which defense counsel did not deem to be prejudicial. *State v. Smith*, 294 N.C. 365, 241 S.E.2d 674 (1978); *State v. Martin*, 294 N.C. 253, 240 S.E.2d 415 (1978); *State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974).

Our careful review of the district attorney's argument in this case discloses that he fulfilled the obligation of his office with zeal. His argument was based upon the evidence presented and was within the recognized bounds of propriety. Further, we have heretofore considered com-

ments similar in nature to those here specifically excepted to and found them to be without prejudicial error. *See, e.g., State v. Wortham*, 287 N.C. 541, 215 S.E. 2d 131 (1975); *State v. Stegman*, 286 N.C. 638, 213 S.E. 2d 262 (1975); *State v. Noell, supra; State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971); *State v. Mullis*, 233 N.C. 542, 64 S.E. 2d 656 (1951). We find no prejudicial error in the argument of the district attorney.